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NOTE AND COMMENT.

THE RULE OF CERTAINTY IN DAMAGES AND THE VALUE OF A CHANCE.—Although our text-books say that the rule of certainty is "more fundamental than any rule of compensation because compensation is allowed or disallowed subject to it," (cf. SEDGWICK, EL. OF DAMAGES, p. 12) nevertheless the tendency of the courts seems to be to save the equitable principle of compensation at the expense of certainty. A striking illustration of this is found in a recent case in the Court of Appeal, *Chaplin* v. *Hicks*, C. A. [1911] 2 K. B. 786. The defendant, a theatrical manager, agreed to give positions as actresses to persons chosen by the votes of the readers of a newspaper. In response to his advertisement about six thousand photographs were sent in, and from these a committee picked about three hundred. These were published in the paper and from them the readers selected five in each of the ten districts into which the country was divided. From this fifty, twelve were to be selected by a committee before which the candidates were to appear. The plaintiff's name was at the head of the five in her particular section. The defendant failed to give her proper notice of the meeting of the committee and she was thus deprived of her chance of winning a prize. The prizes were of considerable value, being appointments to positions for three years

at salaries ranging from five to three pounds a week for the period named. The jury gave her one hundred guineas damages, and, on judgment being granted for this sum, the defendant appealed. The upper court dismissed the appeal, holding that she was entitled to recover substantial and not merely nominal damages.

The facts in this case fortunately present more clearly than has any previous case the definite question as to whether the value of a chance is too uncertain for the law to estimate, and the discussion squarely announces that "the loss of a chance of winning in a competition is assessable." In previous cases on similar states of fact the question of remoteness of injury has often been confused with this question of the value of a chance. *Watson* v. *Ambergate etc. Ry.*, 15 Jur. 448 (1851). The defendant here argued the question of remoteness, but the court in each of the three opinions said that the loss was the natural and proximate result of the breach and that the damages were within the contemplation of the parties as the possible direct outcome of the breach. We thus reach the conclusion that damages may be "contemplated" though not accurately defined, and that it is the function of the jury in such a case to determine the extent of the sum in contemplation. "The taking away from the plaintiff of the opportunity of competition, as one of a body of fifty, when twelve prizes were to be distributed, deprived the plaintiff of something which had a monetary value."

The question naturally arises, how far may the jury go in this liquidation of a probability? Up to the present time the authorities have considered the question as to whether gains expected from a competition were or were not too uncertain for compensation. SEDGWICK, in the eighth edition of his DAMAGES, § 200, favors the affirmative of this proposition, on the authority of a dictum by ERLE, J., in the case of *Watson* v. *Ambergate etc. Ry., supra.* This opinion was, however, disapproved of in the case of *Adams Express Co.* v. *Egbert,* 36 Pa. 360 (1860). These cases are, however, equally undecisive of the question because the decision in the first, which was a suit for damages for failure to deliver plans for competition at the proper time, went off on another point; and in the second case, which was brought on the same state of facts, it appeared from the testimony of one of the committee that the plans could not have received the prize, if they had been delivered, consequently the plaintiff was held entitled to nominal damages only. MAYNE (See TREATISE ON DAMAGES, 8th Ed., p. 70) agrees with SEDGWICK as to the correct principle of decision, arguing that it would be absurd to claim that if the plans of all the contestants had been delayed by the carrier, each and all would have had a right to recover. But there seems to be no reason why under the facts in our principal case each of the contestants might not have had a right to recover a substantial sum, if she had been deprived of her right to compete.

The case of *Sapwell* v. *Bass,* [1910] 2 K. B. 486, was quoted by the defendant in the principal case in support of his contention. In that case the plaintiff had contracted to send a mare to a farmer's stallion belonging to the defendant and the defendant broke the contract. It was held that the plaintiff was entitled to only nominal damages, but on the ground that there was

no evidence that the right was worth more than the three hundred guineas which the plaintiff would have had to pay for the service, consequently he had lost nothing. The court, however, argued that the damages were not recoverable because they were unassessable, and proved this by piling up the probabilities against the right having any value; that the stallion should be alive and well, that the mare should be a well-bred one, that she should not be barren, that she should not slip the foal, that the foal should be a good one, etc. etc. The court in our principal case did not answer these objections but did say that the contract gave the plaintiff a right for which many people would pay money and therefore the plaintiff might recover even though the final result depended on a contingency.

It is well established that "mere difficulty in assessing damages is no reason for denying them." *Nat. Bank of Minneapolis* v. *City of St. Cloud*, 73 Minn. 219 (1898); *Banta* v. *Banta*, 84 N. Y. App. Div. 138 (1903); *Iowa-Minn. Land Co.* v. *Conner*, 136 Iowa 674, 112 N. W. 820 (1907); *Smalling* v. *Jackson*, 133 N. Y. App. Div. 382 (1909); *Swift & Co.* v. *Redhead*, 147 Iowa 94, 122 N. W. 140 (1909). "Difficulty in computing damages does not entitle the party at fault to escape with merely nominal damages." *Goldman* v. *Wolff*, 6 Mo. App. 490 (1879); *Stone* v. *Pentecost* (Mass.) 96 N. E. 335 (1911). "Damages will not be denied because their nature is such that they can not be accurately determined." *Gilbert* v. *Kennedy*, 22 Mich. 117 (1871). "Compensation is not confined to cases capable of accurate estimate as courts and juries may act on probable and inferential proof." *Rugg* v. *Rohrbach*, 110 Ill. App. 532 (1903). In a suit for a breach of an unconditional offer to give the plaintiff the agency in any Mexican town in which he could place fifty machines, it was held that the offending party should not escape liability because the damages are uncertain. All the facts and proper instructions should have been given to the jury. *Wakeman* v. *Wheeler and Wilson Co.*, 110 N. Y. 205 (1886). Even where the exercise of volition of another comes between the competitor and what he hopes to get under the contract, damages may be assessed by a jury. *Richardson* v. *Mellish*, 2 Bing. 229 (1851).

These principles apply *a fortiori* in tort, *Allison* v. *Chandler*, 11 Mich. 542 (1863). Cf. *Smalling* v. *Jackson, supra*. The tort cases are, however, sharply differentiated from the contract cases in that the question of remoteness is never confused with the question of assessability because all consideration of contemplation of parties is eliminated in tort.

Our principal case makes a reasonable extension of the law on the subject. It does not, however, answer squarely the question as to what effect the further doubling up of the probabilities would have upon the question of assessability by the jury. Suppose that the plaintiff, as one of the original six thousand, had been deprived of her chance of getting into the first picked class of three hundred? Probably the answer to this would be found in the discussion by this court of the decision in *Sapwell* v. *Bass, supra*. Did "the contract give the plaintiff a right of * * * value, one for which * * * people would give money," supposing it were capable of transfer? If so, the jury should then have a right to exercise its discretion in the assessment of the value of the loss J. H. D.